Supreme Court, U.S.
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No. 06-743

IN THE

Supreme Court of the United States

CHARLES ROBERT VII, ALSO KNOWN AS SNOWFLAKE 5391,

Petitioner,

-v-

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, a U.S. citizen and attorney in the 1980s, was the target of Foreign Intelligence Surveillance Court (FISC) domestic electronic surveillance warrants when he challenged the Executive Branch's nonacquiescence policy regarding incorrect benefits paid to his aged, blind and disabled clients and asserted that the HHS computer had been programmed to deny benefits in order that un-audited HHS funds be diverted to pay for medical treatment of the Contras at a Florida HMO in violation of the Boland Amendments.

I. Should the Executive Branch release, pursuant to the Freedom of Information Act (FOIA), the 1980s Affidavits relied upon by the FISC in authorizing electronic surveillance of the petitioner, who vehemently asserts that there was absolutely no evidence that he was a terrorist or an agent of a foreign power, despite the DOJ's national security FOIA defense?

II. Is judicial independence compromised when Article III courts do not review *in camera* FOIA-requested documents that are withheld pursuant to the Executive Branch's use of a purported national security "Glomar Response" FOIA defense and the Executive Branch attorneys' claimed limitless authority under Article II of the Constitution to protect the national security?

III. Should this Court apply the Foreign Intelligence Surveillance Act (FISA) *in camera* judicial review standard, 50 U.S.C. §1806 (f), to petitioner's FOIA appeal?

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Petitioner respectfully prays that a writ of certiorari issue to review the Judgment below.

OPINIONS BELOW

On August 25, 2006, the Second Circuit denied the appellant's petition for en banc rehearing. Appendix A.

On April 11, 2006, the Second Circuit affirmed the decision of the District Court that dismissed the petitioner's FOIA complaint. Appendix B.

On March 9, 2006, after oral argument, the Second Circuit issued a Summary Order instructing the parties to specifically address the application of 50 U.S.C. §1806 (f) to the FOIA withheld documents:

> 1) Does 50 U.S.C. §1806 (f) apply to Robert's FOIA request to the Office of Intelligence Policy and Review FOIA Coordinator for "all FISA (Foreign Intelligence Surveillance Act) Affidavits that were relied upon by the FISA court to authorize wiretaps of the telephones of Charles Robert, Esq., a/k/a Snowflake 5391"? Appendix C.

On March 1, 2005, Eastern District of New York Judge Garaufis dismissed the FOIA action seeking the release of the FOIA withheld documents. Appendix D.

JURISDICTION

On April 11, 2006, the Second Circuit issued its Summary Order. On August 25, 2006, the Second Circuit denied the petition for rehearing en banc. The jurisdiction of this court is pursuant to 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Article I, Section 1 of the Constitution.

2. Article II, Section 3 of the Constitution.

3. Article III, Section 1 of the Constitution.

4. The Foreign Intelligence Surveillance Act, 50 U.S.C. 1806 (f), *In camera* and *ex parte* review by district court.

5. The Freedom of Information Act, 5 U.S.C. 552 (b)(1).

6. The Freedom of Information Act, 5 U.S.C. 552 (c) (3).

7. The President's March 25, 2003 Executive Order 13292 Section 1.5, duration of classification.

8. The President's March 25, 2003 Executive Order 13292 Section 1.7, classification prohibitions and limitations.

9. The President's March 25, 2003 Executive Order 13292, Section 3.6, to confirm or deny existence of documents.

10. The President's December 14, 2005 Executive Order 13392 - Improving Agency Disclosure of Information. 70 F.R.75373 (December 19, 2005).

STATEMENT OF THE CASE

This is an appeal of Second Circuit's decision that affirmed the March 1, 2005 dismissal decision of Eastern District of New York (EDNY) Judge Garaufis. There was jurisdiction in the EDNY to render the dismissal decision based on the FOIA judicial review standards. 5 U.S. C. §552 (a) (4)(B) and 5 U.S.C. §552 (6)(C).

In December, 1984, Department of Health and Human Services (HHS) General Counsel X initiated a civil and criminal "Fraud upon the Government" investigation of Charles Robert, Esq. HHS General Counsel X assigned six Special Agents to review hundreds of Robert's aged, blind, and disabled clients' HHS case files and to interrogate more than a score of Robert's clients, *ex parte*, in their homes.

These Special Agents questioned petitioner's clients about the legal advice that he had provided his clients and the legal fees that he had charged for his legal services. The civil and criminal HHS "Fraud Against the Government" investigation of Robert ended in June, 1987.

The Special Agents learned that petitioner was advising his Supplemental Security Income (SSI) clients that HHS was incorrectly computing their benefits and that HHS General Counsel X should have programmed the HHS/SSA computer to apply the regulation determining income for SSI recipients who reside in all 50 States by the federal income regulation as per the Seventh Circuit holding in *Jackson v. Schweiker*, 683 F.2d 1076 (7th Cir. 1982). The Special Agents learned that the petitioner was informing his clients that HHS General Counsel X had determined that the Seventh Circuit had "incorrectly" decided *Jackson* and was implementing a "*Jackson* nonacquiescence policy" to deny benefits to the SSI recipients residing in the 47 States that were not the Seventh Circuit states.

On July 25, 1985, the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary held an Oversight Hearing to consider legislation to end the HHS-SSA-DOJ nonacquiescence policy. DOJ Deputy Associate Attorney General (DAAG) Carolyn Kuhl testified that there was no need for legislation because the HHS-SSA-DOJ nonacquiescence policy had ended on June 3, 1985. DAAG Kuhl explained that a new "acquiescence" policy had been implemented whereby the HHS Secretary and the SSA Commissioner applied the duly promulgated HHS regulations when adjudicating the benefits of SSI recipients. See July 25, 1985, Oversight Hearing before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary: Judicial Review of Agency Action: HHS Policy of Nonacquiescence.

On November 18, 1985, the petitioner filed a FOIA complaint seeking the release of the universe of HHS

documents from the "Fraud Against the Government" investigation of Robert. *Robert v. Holz*, cv 85-4203 (Wexler, J). Based on FOIA-requested documents that the government released in *Robert v Holz*, the petitioner learned that the DOJ had assigned the code name of "Snowflake 5391" to Robert. An AUSA in a non-written communication informed the petitioner that the "Fraud Against the Government" investigation of Robert was based on a "national security" reason.

Based on a series of events that included the televised Iran-Contra hearings, a "mosaic of documents" released in the FOIA action, documents provided sua sponte by Executive Branch employees and attorneys, the petitioner learned that his telephones had been subject to electronic surveillance. By connecting the dots of the information contained in the "mosaic of documents" and non-written information provided by government employees who were afraid to rely upon the "whistleblower" law, the petitioner concluded that HHS General Counsel X had been a CIA-Department of Defense (DOD) covert agent both as the 1982-1985 HHS General Counsel and then in December, 1985, when he became the Chief of Staff of the Florida HMO International Medical Center, Inc. (IMC). As a covert agent, he participated in a rogue domestic CIA-DOD "black operation" that was conducted at IMC to divert un-audited HHS funds to IMC to pay for the medical treatment of the Contras in violation of the Boland Amendments, the National Security Act of 1947, and the Posse Comitatus Act of 1878. See background information regarding IMC in the April 14, 1988 House Committee on Government Operations Report: *Medicare Health Maintenance Organizations: The International Medical Centers Experience*. See *Miami Mystery: Paid to Treat Elderly, IMC Moves in Worlds of Spying and Politics: Medicare Money Flowed in: Only Mr. Recarey Knows Where It Flowed Next: Congress, "bugs" and Mob*. Wall Street Journal 8-8-1988. See also the 12-2-85 voucher for $20 million paid to IMC

after the Boland Amendments. http://www.snowflake 5391.net/IMC.pdf.

The petitioner concluded that Executive Branch attorneys who believed in the "unitary Executive" theory of the President's unlimited Article II authority to protect the national security had provided false information to AG Meese and to FBI Director Judge Webster that "Snowflake 5391" was a terrorist or an agent of a foreign power in order to secure the Robert domestic surveillance warrants. The petitioner concluded that the Executive Branch attorneys sought the FISC domestic surveillance warrants as part of a counter intelligence covert operation to secure the disbarment of Robert. The petitioner concluded that the Executive Branch attorneys sought to end Snowflake 5391's litigation opposing the HHS nonacquiescence policy. If successful, this litigation would put at risk the ability of domestic covert agents to divert un-audited HHS money to fund "black operations" to protect the national security.

On January 12, 1988, the *Robert v. Holz* FOIA trial was held within Judge Wexler's Chambers. At the trial, EDNY AUSA M. Lawrence Noyer informed Judge Wexler that the civil and criminal "Fraud Against the Government" investigation of Robert had ended in June, 1987. AUSA Noyer also testified on behalf of the government out of the presence of the plaintiff who was proceeding pro se. See sealed *Robert v Holz* January 12, 1988 trial transcript in the custody of the Clerk of the Court. After reviewing the FOIA-withheld and redacted documents, Judge Wexler rendered his trial decision and denied Robert access to the withheld and redacted HHS documents. Judge Wexler dismissed the FOIA action. The petitioner did not appeal the *Robert v Holz* decision.

On March 25, 2003, President Bush amended President Reagan's Executive Order 12958 and issued Executive Order 13292. Section 1.5 of this Executive Order established the 10 and 25 year classified information

duration limitations. Section 1.7 established the prohibitions to prevent the misuse of the classification designations.

On February 17, 2004, the petitioner filed a FOIA request seeking the release of FISA Affidavits which AG Meese and FBI Director Judge Webster had filed when they secured the 1980s FISC surveillance warrants to wiretap petitioner's telephones and to perform a mail cover. On March 1, 2004, the Office of Intelligence Policy and Review Counsel James A. Baker denied the FOIA request and informed the petitioner of the use of FOIA Exemption 1 and the "Glomar Response" defense to neither admit nor deny the existence of the FOIA requested documents:

> The Office of Intelligence, Policy and Review (OIPR) maintains copies of all Foreign Intelligence Surveillance Court (FISC) applications, as well as requests for approval of various foreign intelligence and counterintelligence collection techniques such as physical searches or mail covers. We did not search these records in response to your request because the existence or nonexistence of such records on specific persons or organizations is properly classified under Executive Order 12958, as amended. To confirm or deny the existence of such materials in each case would tend to reveal which persons or organizations are the subjects of such requests. Accordingly, we can neither confirm nor deny the existence of records responsive to your request pursuant to 5 U.S.C. 552 (b)(1).
>
> Furthermore, if there were any records in these files responsive to your request, they would be exempt from disclosure under section (b)(1) of the Freedom of Information Act. As stated earlier, however, you should not construe this

> response as either confirming or denying the existence of any such records pertaining to your request. Emphasis Added.

OIPR Counsel Baker used the "neither confirm nor deny" defense commonly called the "Glomar Response" to withhold the FISC documents. See *Phillippi v. CIA*, 546 F. 2d 1009 (D.C. Cir. 1976). The petitioner respectfully submits that it is significant that OIPR Counsel Baker used the FOIA Exemption 1 and the "Glomar Response" defenses, that are subject to an Article III review of the factual issue of whether he properly applied the FOIA exemptions. Had he used the "state secrets" defense, that defense would not have been subject to Article III review.

On March 30, 2004, the FOIA requester appealed the March 1, 2004 decision. Included in that appeal was the petitioner's request that pursuant to Executive Order 13292 Section 1.5, the classified documents be declassified. In addition, the petitioner requested pursuant to Section 1.7, that a determination be made whether the original classification of the documents had been improper because it involved a rogue domestic CIA-DOD covert operation that was conducted in violation of the Boland Amendments and the National Security Act of 1947.

On May 12, 2004, as more than 30 days had passed since the filing of the FOIA request, the petitioner filed the FOIA complaint *Robert VII v DOJ* appealing the OIPR Counsel's decision. http://www.snowflake5391.net/rob7vdoj.pdf. That FOIA complaint also sought the release of the "*Christensen* nonacquiescence policy" documents upon which it was determined that the "law" programmed into the HHS and SSA computers was not the duly promulgated regulations, but Executive Branch attorneys' interpretations of the duly promulgated regulations.[1] "To defer to the

[1] This petition for a writ of certiorari does not include an appeal of the Second Circuit's decision to affirm the District Court's decision to dismiss the FOIA request for the "*Christensen* nonacquiescence policy"

agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

On October 1, 2004, Counsel for Intelligence Policy Baker provided EDNY U.S. Attorney Roslynn Mauskopf his October 1, 2004 Declaration that was filed with Judge Garaufis in which OIPR Counsel Baker explained his use of the "Glomar Response" defense:

> 9. The Department can neither admit or deny the existence of records pertaining to FISA activities such as those called for by the plaintiff's February 17, 2004 request without disclosing classified information. Id. 2.

In his October 1, 2004 Declaration, OIPR Counsel Baker explained why he had determined that the national security would be at risk in 2004 if he even disclosed the existence of the 1980s FOIA withheld documents:

> 11. Such disclosures would be recognized and exploited for the immense intelligence and counter intelligence value that would yield to

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documents. The petitioner filed a *de novo* FOIA request for the documents requested in the *Robert VII v DOJ* complaint and that FOIA request is pending. In addition, the petitioner filed another FOIA request that is now pending seeking the release of the AG Gonzales' *Report on Enforcement of Law*, 28 U.S.C. § 530D(a)(1)(A) and (B), that was to be filed with the Congress explaining the reason for the implementation of the DOJ's "*Christensen* nonacquiescence policy" because the Attorney General did not instruct the HHS Secretary and the SSA Commissioner to acquiesce to this Court's administrative law holding as applied to the standards programmed into the HHS and SSA computers. In 2006, as in 1985, those computers continue to be programmed not to apply the duly promulgated regulations, but to apply the Executive Branch attorneys' interpretations of the duly promulgated regulations.

-trained intelligence analysts, such as those employed by hostile intelligence agencies. Id. 3.

On January 17, 2005, in response to U.S. Attorney Mauskopf's *Robert VII v DOJ* Motion to Dismiss, the petitioner filed a Declaration and informed Judge Garaufis, under oath, that he was not now nor ever was a terrorist or an agent of a foreign power. The petitioner asserted that the purpose of the civil and criminal "Fraud Against the Government" investigation of Snowflake 5391 was to eliminate Robert as an attorney because he was challenging the clandestine implementation of a DOJ-HHS-SSA nonacquiescence policy of HHS General Counsel X by which the General Counsel approved the programming of the HHS computers to apply "nonacquiescence" standards in order to deny benefits and create a pool of un-audited HHS funds that were diverted for purposes not intended by the Congress. The petitioner alleged that, contrary to the sworn July 25, 1985 Congressional testimony of DAAG Kuhl, the HHS-DOJ nonacquiescence policy continued to be implemented as a clandestine policy after June 3, 1985.

The petitioner asserted that HHS General Counsel X had intentionally implemented an illegal clandestine policy when programming the HHS computer. Justice Powell in *Bowen v City of New York*, 476 U.S. 467 (1986), explained the importance of there being a remedy to cure the HHS Secretary's clandestine implementation of an illegal policy:

> Moreover, we are aware that the administrative inconvenience may result from our decision. But the Secretary had the capability and the duty to prevent the illegal policy found to exist in the District Court. The claimants were denied the fair and neutral procedure required by the statute and regulations, and they are now entitled to pursue that procedure. *Id.* 487. Emphasis Added.

The petitioner further asserted that Executive Branch attorneys had provided false information to the Grievance Committee of the Tenth Judicial District regarding the "Fraud Against the Government" of Robert investigation with the intent to secure the petitioner's disbarment. The plaintiff asserted that federal attorneys licensed to practice law in NYS had a duty to comply with NYS Judiciary Law §487 not to deceive judges or parties. He asserted these NYS attorneys had an affirmative ethical duty to cure any misrepresentations that had been made to tribunals as established in *People v. De Pallo*, 96 N.Y.2d 437 (Ct. App. 2001). [2]

On March 1, 2005, Judge Garaufis rendered his *Robert VII v DOJ* decision and granted EDNY U.S. Attorney

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[2] The Court is informed that the petitioner's FOIL request is pending for the release of AG Gonzales' required Report to Congress regarding the Ethical standards for attorneys for the Government. See 28 U.S.C. § 530B. That Report reveals whether NYS DOJ attorneys had a license to withhold material information from Judges and tribunals in order to protect the national security under the theory that DOJ national security policy trumps the NYS ethical standards. That document has relevance to the NYS Appellate Division suspension decision, *In re Robert*, 10 A.D. 3d 96 (2nd Dept. 2004), because of the knowledge of the government attorneys of the accuracy of the government attorneys' representations to the Grievance Committee that Robert had committed "Fraud Against the Government" in the 1980s. That § 530B document takes on more significance because of this Court's unanimous *Arkansas Department of Human Services v Ahlborn*, 125 S. Ct. 1742 (2006), decision holding that the Medicaid lien standard is a "pro rata share" standard and not a "priority" standard. Ahlborn is relevant because the government attorneys who informed the Grievance Committee that the Medicaid lien standard was a "priority" standard also made that same representation to this Court in *Calvanese v. Calvanese-Callahan*, 93 N.Y. 2d 111, 688 N.Y.S. 2d 479 (Ct. App. 1999), *cert. den.sub. nom.* Callahan v. Suffolk County DSS, 528 U.S. 928 (1999). In 1999, while the petitioner was litigating Callahan, five million dollars (which never existed) was posted in his Azzarelli escrow account. The government's use of the "priority" lien standard was a key fact not discussed in the *Robert* decision.

Mauskopf's Motion to Dismiss for lack of jurisdiction. Upon information and belief, Judge Garaufis may have relied upon the accuracy of *ex parte* Declarations that U.S. Attorney Mauskopf may have filed in compliance with the 1986 FOIA amendments as established in 5 U.S.C. §552 (c)(3). See AG Meese's December, 1987 DOJ guidelines for the use of the "c 3 exclusion" defense as explained in Section G 3 of the Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act which continues to be the DOJ "working law" in 2006. http://www.usdoj.gov/04foia/86agmemo.htm.

In his decision, Judge Garaufis relied in part on the President's March 25, 2003 Executive Order, Section 3.6 which authorized the use of the "Glomar Response" defense of a FOIA action to protect the national security:

> Executive Order 12958, § 3.6 allows an agency to refuse to confirm or deny the existence or nonexistence of a requested record 'whenever the existence or nonexistence is itself classified.' Exec. Order No. 19258, § 3.6, as amended by Exec. Order No. 13292 (Mar. 25, 2003): Baker Decl. P. 8. Information which can be considered for classification includes 'intelligence activities (including special activities), intelligence sources and methods, or cryptology.' *Id.* § 1.4(c). The authority to make a determination whether particular material is classified may be delegated to U.S. Government officials by agency heads. *Id.* §1.3. In his Declaration, James Baker states that, in his capacity as the counsel for the Office of Intelligence Policy, he holds 'original classification authority at the TOP SECRET level, by delegation of the Attorney General, and therefore (is) authorized to make determinations regarding classification of

national security information and to conduct classification reviews.' Baker Decl P. 4. *Id.* at 6. Emphasis Added.

On December 9, 2005, in *Robert v DOJ and SSA*, cv -05-3543 (Garaufis, J), Judge Garaufis granted U.S. Attorney Mauskopf's Motion to enjoin the petitioner from filing any new FOIA action without a pre-clearance Order of Judge Garaufis. Petitioner informs the Court that his January 20, 2006 Motion seeking a pre-clearance Order to file a new FOIA action that included seeking the release of the "DOJ sealed *Robert v Holz*" documents, has not been decided by Judge Garaufis.

On December 14, 2005, President Bush issued Executive Order 13392 - *Improving Agency Disclosure of Information.* 70 F.R.75373 (December 19, 2005). The President highlighted the importance of the public having the ability to obtain information subject to the exemptions established by the Congress.

On January 30, 2006, the Second Circuit held the *Robert VII v DOJ* oral argument. After the oral argument, the panel issued its March 9, 2006 Order for the parties to address the specific FISA Section 1806 (f) issue that is raised in this petition. In her April 3, 2006 letter Brief, EDNY U.S. Attorney Mauskopf argued that the FISA Section 1806 (f) did not apply to the FOIA. "The only statute that applies in this case is the FOIA, the statute under which Robert sought documents that may or may not exist." *Id.* at 3. http://www.snowflake5391.net/RobertvDOJbrief.pdf.

On April 11, 2006, the panel issued its decision, but did not address the FISA issue, which had been briefed by the parties or the application of the President's Executive Order 13292. On August 25, 2006, the Court denied the petition for an *en banc* rehearing and did not address the FISA issue or the application of the President's Executive Order 13292.

As of the date of this Brief, no DOJ official has docketed the petitioner's March 30, 2004 request that pursuant to Executive Order 13292 Section 1.5, the FOIA-withheld classified documents be declassified, and pursuant to Section 1.7, a determination be made whether the classification of the documents in 2004 was improper. As of the date of this petition, no DOJ official has docketed the petitioner's subsequent request for the declassification of the "sealed *Robert v Holz*" documents, the "Snowflake 5391" documents in the custody of the "keeper" of the snowflakes3 and the "North Notebook" documents being withheld in the pending FOIA *Robert II v CIA and DOJ*, CV-02-6788 (Seybert, J.) pursuant to FOIA Exemption 1. http://www.snowflake5391.net/rob2vcia_doj.pdf.

The Court is informed that the petitioner's November 16, 2005 DOJ FOIA request seeking the release of the "DOJ sealed *Robert v Holz*" documents has now been pending for over one year. Some of these FOIA requested documents are also contained in the sealed Clerk's *Robert v Holz* file in the custody of the EDNY Clerk of the Court.

The Court is informed that the petitioner has informed AG Gonzales that the purpose of the FOIL request for the "DOJ sealed *Robert v Holz*" documents is to cite those specific documents to the Intelligence Committees in order that the Chairpersons can consider requesting that the "Gang of Eight" read the *Robert VII v DOJ* FOIA withheld documents in the custody of OIPR Counsel Baker at issue in this petition, along with the "DOJ sealed *Robert v Holz*" documents. The petitioner has informed AG Gonzales that during the Congressional Oversight Committees review of

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[3] The Executive Branch use of "snowflakes" and their retention by the designated "keeper" of the snowflakes, was explained by Bob Woodward in State of Denial, Simon & Schuster. "Though unsigned, everyone knew they represented orders or questions from the boss. But if a snowflake leaked, it provided deniability – no signature, no clear fingerprint." *Id.* at 23.

proposed changes to the FISA, that the petitioner will request that the Intelligence Committees determine whether Executive Branch attorneys had provided false information to AG Meese and FBI Director Judge Webster, which was then included in the AG's certifications filed with the FISC, that there was evidence that the petitioner was a terrorist or an agent of a foreign power.

REASONS FOR GRANTING THE PETITION

I. The limited number of reviewable FISA decisions that percolate to the Foreign Intelligence Surveillance Court of Review renders this an appropriate case for the Supreme Court to review.

This Court has never addressed the FISA Section 1806 (f) issue because there have been a limited number of FISA cases which percolate to the Foreign Intelligence Surveillance Court of Review. Because of the secret nature of all FISC proceedings, unless the U.S. citizens targeted by the FISC surveillance warrants are indicted, the targeted U.S. citizens are not even aware that the Attorney General and the FBI Director have filed applications with the FISC certifying that they have evidence that the U.S. citizens are terrorists or agents of a foreign power.

In its one published decision, the Foreign Intelligence Surveillance Court of Review had to solicit the ACLU to secure a Brief to present the arguments of putative aggrieved FISC surveillance court targets. *In re Sealed Case*, 310 F.3d 717 (Foreign Int.Surv.Ct.Rev.2002). Since there is a paucity of FISA cases, this FOIA case provides the Court with an opportunity to review not only the interface of the FISA with FOIA Exemption 1 and the "Glomar Response" defenses to withhold FISA documents, but also DOJ's implementation of the statutorily strict FISA procedures.

In its November 18, 2002 *Sealed Cases* decisions, the Court of Review highlighted the importance of the

procedural protection of the statutory requirements of the content of the AG's "certifications" as a check and balance for Executive Branch officials and attorneys not to violate the FISA. The Court highlighted the fact that strict compliance with the FISA requirements provides an internal Executive Branch check and balance in addition to an Article III check and balance:

> Nevertheless, FISA provides additional protections to ensure that only pertinent information is sought. The certification must be made by a national security officer – typically the FBI Director – and must be approved by the Attorney General or the Attorney General's Deputy. Congress recognized that this certification would "assure written accountability within the Executive Branch" and provide "an internal check on Executive Branch arbitrariness." H. Rep. at 80. In addition, the Court may require the government to submit further information it deems necessary to determine whether or not the certification is clearly erroneous. See 50 U.S.C. §1804(d). *Id.* at 739. Emphasis Added.

In discussing the issues raised in the ACLU Amicus Brief challenging the secret procedures used by government when securing national security surveillance warrants, the Court of Review explained that there could be a district court *ex parte* analysis of a surveillance application, but that the issue of an improper FISC application before an Article III Judge was not then before the Court:

> Under certain circumstances, the judge conducts an *in camera* and *ex parte* review to determine whether the electronic surveillance was lawful, whether disclosure or discovery is necessary, and whether to grant a motion to suppress. *Id.*

> Sections 1806 (f) (g). Clearly, the decision whether to allow a defendant to obtain FISA materials is made by a district judge on a case by case basis, and the issue whether such a decision protects defendant's constitutional rights in any given case is not before us. *Id.* at 741 n. 24. Emphasis Added.

This petition presents the issue of whether Congress intended that in a FOIA action a district court judge have the authority to perform an *in camera* review of FISA documents that the DOJ had previously submitted to the FISC. In this FOIA, the petitioner shouted in his pleadings filed with Judge Garaufis and the Second Circuit, that false information had been provided to the FISC and that an *in camera* review of the FOIA withheld documents would reveal not only that there was absolutely no evidence that the petitioner was a terrorist or an agent of a foreign power, but also that there were facial violations of explicit FISA procedures as explained in *U.S. v. Duggan*, 743 F. 2d 59 (2d Cir. 1984). However, the Courts below decided to dismiss the FOIA without ever reviewing *in camera* the withheld documents to determine whether the DOJ had followed the strict FISA procedures or whether the national security FOIA exemptions had been properly applied.

In summary, the petitioner argues that Congress did not intend that FISA §1806(f) be limited to *in camera* review only by FISC judges. Thus, this case presents the Supreme Court with an opportunity to decide whether because of the secret nature of the FISC, that the Congress intended that FISA §1806(f) be applied to a FOIA action in which a district court judge is to review *in camera* FISA documents as a check and balance to the AG's not complying with the strict FISA requirements.

II. The Court should clarify whether the principles of *Youngstown* apply to the FISA and the FOIA.

The petitioner argues that when the Congress enacted the FISA in 1978, its explicit requirements were intended to balance the President's Article II authority to protect the national security with the potential of abuse that could occur if domestic surveillance warrants were used to target U.S. citizens based on suspect evidence. This case presents the Court with an opportunity to determine if Congress had the Article I authority to provide for Article III review of the President's Article II authority to protect the national security. The petitioner argues that this is an appropriate case for the Court to apply the *Youngstown Sheet and Tube Co. v Sawyer*, 343 U.S. 579 (1952), principles to the authority of the Congress to enact the FISA requirements by which Article III courts must review *in camera* the FOIA-requested documents that the AG files with the FISC seeking domestic surveillance warrants of targeted U.S. citizens.

U.S. Attorney Mauskopf argued below that the FISA §1806(f) did not apply to a FOIA action. Although U.S. Attorney Mauskopf did not explicitly argue that the "c (3) exclusion" of 5 U.S.C. § 552 (c)(3) applied, U.S. Attorney Mauskopf did argue that the Presidents' March 25, 2003 Executive Order 13292 §3.6(a) applied. "An agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors." Executive Order Section 3.6(a).

Therefore, this case presents the intersection of the President's Article II authority as established in Executive Order 13292 § 3.6(a), with the Congress' Article I authority to enact FISA §1806(f) and with its Article III check and balance providing an *in camera* judicial review of FISC documents. Thus, this case presents a post *Hamdan v Rumsfeld*, 126 S.Ct. 2749 (2006), application of the *Youngstown* principles as to whether the President's

Executive Order 13292 §3.6(a), takes precedence over the plain language of FISA §1806(f).

Justice Jackson's *Youngstown* concurring opinion established a judicial framework to apply to a Separation of Powers issue:

> The actual art of governing under our Constitution does not, and cannot, conform to judicial definitions of the power of any of its branches based on isolated clauses, or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.
>
> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. ...
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain....
> 3. When the President takes measures incompatible with the expressed or implied will

> of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. *Youngstown Sheet and Tube Co. v Sawyer*, 343 U.S. 579, 635-638 (1952). Emphasis Added.

Although *Hamdan* involved the application of the Uniform Code of Military Justice (UCMJ) enacted by the Congress in 1950 to establish the governing principles for military courts, Justice Kennedy in his concurring opinion applied the *Youngstown* principles and highlighted the role of Congress establishing a statutory framework that it intended be applied during times of war:

> Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures or the moment. *Hamdan* at 2799.

The 2006 *Hamdan* decision was based on this Court's 2004 *Hamdi* decision which had held that the Executive Branch does not have a "blank check" whenever the President's Article II authority is invoked. "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's

citizens." *Hamdi v Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion).

In summary, this case is an appropriate post-*Hamdan* and *Hamdi* case for the Court to apply the *Youngstown* principles to the President's authority pursuant to Article II of the Constitution to use an Executive Order that in effect voids the plain meaning that Congress provided in FISA §1806(f). If the Court does not grant the petition, then §1806(f) will continue to be a meaningless FISA provision.

III. An Article III check and balance is necessary to maintain the judicial independence of the Judiciary, because there is no internal Article II FISA check and balance review.

Both Judge Garaufis and the Second Circuit blindly deferred to the Executive Branch representation that the FOIA withheld documents in the custody of OIPR Counsel James A. Baker involved properly classified documents without reviewing *in camera* those documents. The petitioner respectfully submits that Article III Judges' blindly deferring to the representations of the Executive Branch attorneys who are implementing their "unitary Executive" theory of the President's Article II authority to protect the national security, impacts on federal judges' judicial independence.

In *Ingle v Department of Justice*, 698 F. 2d 259 (6th Cir. 1983), the Sixth Circuit provided a history of the use of a FOIA Vaughn Index and determined that the district court did not abuse its discretion by conducting an *in camera* review of documents withheld pursuant to FOIA Exemption 1. "The agency's burden is to show that it followed proper classification procedures and that the document, by description, falls logically within the claimed exemption." *Id.* at 268.

In *Ingle*, the Sixth Circuit discussed the delicate issue of an independent Judiciary. The court held that the Court's reading *in camera* the documents withheld pursuant to the

AG's claim of national security does not abuse the discretion of the judiciary:

> *In camera* review does not suspend the adversary system nor abrogate the government's role of asserting any applicable exemptions. It is, at a minimum, an *abuse of discretion* for a trial court to become the government's advocate behind closed doors while the petitioner is left without knowledge of which exemptions are being advanced and why they are being accepted or rejected. *Id.* at 269. Emphasis Added.

This judicial independence issue becomes critically important when the FOIA-withheld documents involve information secured from FISA domestic wiretaps that the AG uses in his renewal requests for additional FISC surveillance warrants. In *Mitchell v Forsyth*, 472 U.S. 511 (1985), this Court rejected AG Meese's argument that the AG should be protected by the use of an absolute immunity defense. Justice White wrote the crystal clear majority opinion that the AG does not have absolute immunity based on a claimed good faith Article II duty to protect the national security:

> We conclude that the Attorney General is not absolutely immune from suit for damages arising out of his allegedly unconstitutional conduct in performing his national security functions.
>
> As the Nation's chief law enforcement officer, the Attorney General provides vital assistance to the President in his performance of the latter's constitutional duty to 'preserve, protect, and defend the Constitution of the United States.'

> U.S. Const. Art. II, 1, cl. 8. Mitchell's argument, in essence, is that the national security functions of the Attorney General are so sensitive, so vital to the protection of our Nation's well-being, that we cannot tolerate any risk that in performing those functions he will be chilled by the possibility of personal liability for acts that may be found to impinge on the constitutional rights of citizens. Such arguments, 'when urged on behalf of the President and the national security in its domestic implications, merit the most careful consideration.' *Keith*, 407 U.S., at 219. Nonetheless, we do not believe that the considerations that have led us to recognize absolute immunities for other officials dictate the same result in this case. *Michell v Forsyth, 472 U.S. 511,* 520. Emphasis Added.

Justice White continued by explaining the danger in 1985 to the Constitution if there are no restraints on the Attorney General's good faith zeal to protect the national security with the use of domestic wiretaps:

> Similar built-in restraints on the Attorney General's activities in the name of national security, however, do not exist. And despite our recognition of the importance of those activities to the safety of our Nation and its democratic system of government, we cannot accept the notion that restraints are completely unnecessary. As the Court observed in *Keith*, the label of "national security" may cover a multitude of sins:
>
> > National security cases.... often reflect a convergence of First and Fourth

> Amendment values not present in cases of 'ordinary' crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech.... History abundantly documents the tendency of Government- however, benevolent and benign in its motives – to view with suspicion those who most fervently dispute its policies....The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security,' Given the difficult of defining domestic security interest, the danger of abuse in acting to protect that interest becomes apparent." 407 U.S. at 313-314.
>
> The danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity. *Mitchell v Forsyth, 472 U.S. 511*, 523. Emphasis Added.

The June 18, 1985 *Mitchell* decision is relevant to this FOIA because it was decided early into the 1984-1987 civil and criminal "Fraud Against the Government" investigation of the petitioner. The *Mitchell* decision takes on greater importance because of the 1986 Amendments to the FOIA with its establishment of the "c 3 exclusion" defense which were implemented in December, 1987 by AG Meese in his Section 3 (g) of the *Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act*, with its requirement that DOJ attorneys file *ex parte* Declarations with the district court judges:

> Accordingly, it shall be the government's standard litigation policy in the defense of FOIA lawsuits that wherever a FOIA plaintiff raises a distinct claim regarding the suspected use of an exclusion, the government routinely will submit an *in camera* declaration addressing that claim, one way or another. Where an exclusion was in fact employed, the correctness of that action will be justified to the court. Where an exclusion was not in fact employed, the *in camera* declaration will simply state that fact, together with an explanation to the judge of why the very act of its submission and consideration by the court was necessary to mask whether that is or is not the case. In either case, the government will of course urge the court to issue a public decision which does not indicate whether it is or is not an actual exclusion situation. Such a public decision, not unlike and administrative appeal determination of an exclusion-related request for review, should specify only that a full review of the claim was undertaken and that, if an exclusion in fact was employed, it was and continues to remain, amply justified. *Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act*, at p. 20. *Supra.* at 11.

The instant case raises the judicial independence issue because in this case Article III Judges' abrogated their inherent authority to police the accuracy of the representations made by parties to the Court, including *ex parte* Declarations filed by government attorneys. This Court established a federal "fraud upon the court" standard in *Chambers v. Nasco*, 501 U.S. 32 (1991), to maintain the integrity of the judicial review process. In reviewing false

pleadings filed by a party, the *Chambers* Court trumpeted the inherent authority of a court to protect its own integrity when false representations are made to a court, by vacating the prior judgment:

> This 'historic power of equity to set aside fraudulently begotten judgments,' cite omitted, is necessary to the integrity of the courts for "tampering with the administration of justice in (this)manner ...involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public. cites omitted. Moreover, a court has the power to conduct an independent investigation whether it has been the victim of a fraud. Cite omitted. *Id.* at 44. Emphasis Added.

Notwithstanding the fact that the petitioner had shouted in his signed pleadings that a "fraud upon the court" had been committed in the FISC because there was absolutely no evidence that he was a terrorist or an agent of foreign power, neither Judge Garaufis nor the Second Circuit read *in camera* the FOIA-withheld documents to determine if there was any credence to the petitioner's assertion that the FISA certifications that the AG had filed with the FISC contained false information. Rather, the FOIA action was dismissed, notwithstanding this Court's standard that a plaintiff's allegations are to be considered in the light most favorable to the plaintiff. *See Leatherman v Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993).

In summary, the petitioner argues that this petition should be granted in order for the Court to establish a 2007 bright line *in camera* review standard by which Article III Judges can maintain their judicial independence in FISA cases involving wiretaps of targeted U.S. citizens by

applying both the *Mitchell* domestic wiretapping holding and the *Chambers* "fraud upon the court" standard. This case provides an opportunity for the Court to eliminate any public perception that Article III Judges, including FISC Judges, are not a "check and balance" to Executive Branch attorneys' incantation of their "unitary Executive" mantra that the President's Article II authority to protect the national security is without limits.

IV. Because AG Gonzales did not use the state secrets defense, this Court should decide whether the FISA §1806(f) applies to documents withheld pursuant to the use of the FOIA Exemption 1 and the "Glomar Response" defenses.

AG Gonzales determined not to use the state secrets legal defense to end this litigation. As a result, this case involves the Court applying its statutory construction rules to the facts, unencumbered by the state secrets defense.

The FISA §1806(f) is clear on its face that courts should review documents *in camera* to determine if the government has complied with the FISA. The petitioner is also asserting that Executive Branch attorneys may have violated the 1986 FOIA Amendments that the U.S. Attorney file an *ex parte* Declaration with the FOIA Court which explains in detail the reasons for the use of the FOIA Exemption 1 and the "Glomar Response" defenses.

If EDNY U.S. Attorney Mauskopf filed a FOIA 5 U.S.C. 552 (c)(3) *ex parte* Declaration with Judge Garaufis, then that Declaration would provide a detailed explanation why the national security would be at risk if the petitioner learned of the existence of the FOIA withheld documents. If the EDNY U.S. Attorney did not file an *ex parte* declaration, then this would be evidence of the AG implementing a "Barrett nonacquiescence policy" whereby the AG withholds material information from the Article III courts in order to protect the national security. "Finally, acceptance of the view urged by the federal appellants would result in a

blanket grant of absolute immunity to government lawyers acting to prevent exposure of the government in liability." *Barrett v. United States*, 798 F. 2d 565, 573 (2d Cir. 1986).

When performing his due diligence research in drafting the government's Brief in opposition to this petition, Solicitor General Clement will have read the *Robert VII v DOJ* withheld documents in the custody of OIPR Counsel Baker. Therefore, the Solicitor General will be privy to classified information that reveals a U.S. history that may not be known to Judge Garaufis and the Second Circuit when they rendered their decisions without reading *in camera* the documents. As a result, Solicitor General Clement may decide to file with the Supreme Court an *ex parte* Declaration pursuant to AG Meese's December 1987 standards for implementing the 1986 FOIA Amendments which reveals information that does not constitute a state secret, but information that has been classified pursuant to Sections 1.5 of Executive Order 13292.

This petition is especially timely because the documents that had been classified in 1982 to shield the clandestine "black operation" that was conducted at the Florida HMO International Medical Center, Inc., will be subject to public release in 2007 by application of the Executive Order Section 1.5 declassification standard of 25 years. The declassification of these documents will be subject to Congressional Oversight in compliance with the National Security Act of 1947, 50 U.S.C. § 413, Reports to Congressional committees of intelligence activities and anticipated activities, as applied to the CIA. These are timely documents for Members of Congress to read if in 2007 the Congress considers amending the Posse Comitatus Act of 1878, 10 U.S.C. 375, as applied to the DOD's National Security Agency (NSA), and amending the FISA to provide checks and balances to oversee NSA domestic electronic surveillance.

The declassification of these documents will open up a historical can of worms. The public will learn whether in

1982, CIA Director Casey and DOD Secretary Weinberger used un-audited HHS funds to pay for the medical treatment of the Contras for the period prior to June, 1985 when the Congress authorized State Department Nicaraguan Humanitarian Assistance Office (NHAO) funds to provide humanitarian assistance to the Contras. "I think everyone knew we were walking a very thin line." Lt. Col. North's courier Robert W. Owen, as quoted in *A Very Thin Line,* Draper, Hill and Wang, at 50. The public will also learn whether CIA Director Casey breached his "Casey Accords" agreement to report covert actions to the Intelligence Committees. See Keeping "USG Fingerprints" Off the Contra Operation: 1984-1985, *Report of the Congressional Committees Investigating the Iran-Contra Affair*, H. Rept. No. 100-433 and S. Rept. No. 100-216, Chapter 6 at 117.

The declassified CIA and DOD documents will also trigger the public's careful reading of the President's Special Review Board that issued the Tower Commission Report. Chairman Senator Tower, Senator Muskie, and former National Security Advisor Brent Scowcroft began their Narrative with the epigraph "*Quis custodiet ipsos custodies*" which translates as "Who shall guard the guardians themselves." *The Tower Commission Report*, Bantam Books Inc. and Times Books, Inc. 1987 at xvi and 102. The 2007 Congressional Oversight Committees will be reviewing documents to determine if the 1980s "stovepipes" that existed at the DOJ, CIA, and DOD, continue to exist in 2007 evading the necessary transparency and accountability procedures as applied by the agencies' own decision makers.

As the 2007 Congress considers legislation to establish standards for NSA domestic surveillance, the issue of the rights of U.S. citizens and the accuracy of the AG's representations to the FISC will be a public issue. Congressional Oversight Committees may consider holding 2007 hearings as to how the 1978 FISA has been implemented from 1978-2006. *See* the *Report of the Senate Select Committee to Study Government Operations with*

Respect to Intelligence Activities, S. Rep. 94-755, 94th Cong., 2d Sess. (1976))(Church Committee) which revealed to the public that the Executive Branch officials had engaged in warrantless wiretapping of numerous U.S. citizens who posed no threat to the nation's security and who were not suspected of any criminal offense.

The Executive Branch's decision not to claim a state secrets defense in a FOIA action, triggers Article III judicial review of the use of FOIA national security defenses. The Court should note that as of November 15, 2006, CIA Director General Hayden agreed to release FOIA-requested documents, previously withheld under the national security defenses, that include a Presidential Directive granting the CIA authority to set up detention facilities outside the U.S. and outlining interrogation methods that may be used against detainees. *C.I.A. Tells of Bush's Directive on the Handling of Detainees*, Johnston, NY Times, 11-15-06, A 14. The CIA letter in *ACLU v DOJ*, cv 04-4151 (Hellerstein, J) is posted on the internet. http://www.aclu.org/images/torture/asset_upload_file825_27365.pdf. The petitioner submits that his documents likewise should be released.

As the appellant is an "aggrieved person" covered by Section 1806 (f), this Court should establish a bright line defining the intersect between the FISA and the FOIA in order that the DOJ attorneys strictly comply with the FISA requirements and that government attorneys do not tamper with historical facts that are under their control. "Who controls the past controls the future: who controls the present controls the past." *1984*, George Orwell, Penguin 1961, p. 35.

Finally, the Court should note that the Executive Branch has never denied petitioner's assertions that the affidavits presented to the FISC contained false information that there was evidence that the petitioner was a terrorist or an agent of a foreign power. Instead, the Executive Branch attorneys have used the "Glomar Response" defense

assertion that the national security will be at risk if the FOIA requested documents are released to the petitioner. Thus, the lie that was cast in December, 1984 when HHS General Counsel X determined that there was evidence to assign Six Special Agents to conduct a "Fraud Against the Government" investigation of the petitioner, survives in 2006. "The history of our race, and each individual's experience, are sown thick with evidence that a truth is not hard to kill and that a lie told well is immortal." Mark Twain. http://www.twainquotes.com /Lies .html.

CONCLUSION

The Supreme Court should grant this petition because this case presents a first opportunity for the Court to review the intersection of the FISA and the FOIA. This case also presents the timely Separation of Powers issue whether the Congress has the authority to provide Article III Judges with the statutory FOIA duty to review *in camera* documents that the Attorney General submitted to the FISC seeking domestic surveillance warrants of a U.S. citizen in the 1980s.

Dated: November 20, 2006

Charles Robert
pro se Plaintiff-Appellant
441B West Broadway
Long Beach, New York 11561
(516) 889-2251

APPENDIX A

Second Circuit Order, dated August 25, 2006 Denying the Appellant's Petition for En Banc Rehearing.

UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKeehnie
Clerk

Date:	
Docket Number:	05-1773-cv
Short Title:	Robert v. Department of Justice
DC Docket Number;	04-cv-1961
DC	EDNY (BROOKLYN)
DC Judge	Honorable Nicholas Garauf

At a stated term of the United States Court of Appeals for the Second Circuit held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 25th day of two thousand six.

Robert vs. Department of Justice

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Plaintiff-Appellant Charles Robert VII, aka Snowflake 5391. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested. that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk

By: _____

Motion Staff Attorney

APPENDIX B

Second Circuit Order, dated April 11, 2006 Affirming the Decision of the District Court that Dismissed the Petitioner's FOIA Complaint.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 11th day of April, two thousand and six.

PRESENT:

HON. GUIDO CALABRESI,
HON. CHESTER J. STRAUB,
HON. RICHARD C. WESLEY,
Circuit Judges.

CHARLES ROBERT VII, also known as Snowflake 5391,

Plaintiff-Appellant,

v. No. 05-1773-cv

DEPARTMENT OF JUSTICE,

Defendant-Appellee.

For Appellant:
CHARLES ROBERT, *pro se*, Long Beach, N.Y.

For Appellee:
Kathleen A. Mahoney, Assistant United States Attorney (Varuni Nelson, Assistant United States Attorney, *of counsel*), for Roslynn R. Mauskopf, United States Attorney, Eastern District of New York, Brooklyn, N.Y.

Appeal from a final decision of the United States District Court for the Eastern District of New York (Garaufis, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **AFFIRMED.**

Plaintiff-Appellant Charles Robert ("Robert") appeals from a March 1, 2005 order of the district court that granted the motion of Defendant-Appellant, the United States Department of Justice ("DOJ"), to dismiss, for lack of subject matter jurisdiction, Robert's claims under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Robert had requested information under FOIA from two subunits of the DOJ. From the Executive Office for United States Attorneys ("EOUSA"), Robert sought documents relating to the DOJ's decision to defend a certain policy of the Social Security Administration and the Department of Health and Human Services. From the Office of Intelligence Policy and Review ("OIPR"), he sought the release of affidavits allegedly relied on by the Foreign Intelligence Surveillance Court to authorize wiretaps of his telephones. He brought

this action under 5 U.S.C. § 552(a)(4)(B) to contest EOUSA's and OIPR's failure to produce the requested information.

We assume the parties' familiarity with the facts, the procedural history, and the specification of issues on appeal. With respect to the FOIA request to EOUSA, the district court concluded that Robert had failed to exhaust administrative remedies. FOIA provides that request denials may be appealed to the heads of agencies, 5 U.S.C. § 552(a)(6)(A)(i), and requesters are required to exhaust this administrative remedy before turning to litigation — although they may be deemed to have exhausted constructively if the agency fails to make a timely response to the initial request. See Ruotolo v. Dep't of Justice, Tax Div., 53 F.3d 4, 8 (2d Cir. 1995); see also 5 U.S.C. §552(a)(6)(A)(i) (providing that agencies shall respond to FOIA requests within twenty working days). Because Robert did not take the administrative appeal from EOUSA's timely denial before filing suit, we agree with the district court that he failed to exhaust administrative remedies.

OIPR, on the other hand, declined to furnish the requested documents, or even to indicate whether affidavits for wiretaps on Robert existed, on the grounds that such information fell within FOIA Exemption 1, for information classified pursuant to an Executive Order. See 5 U.S.C. § 552(b)(1). For the reasons given by the district court, we agree that Exemption 1 permits OIPR to refuse to disclose whether it has any documents pertaining to Robert, and to refuse to turn over any such documents that it may, in fact, possess. We are not certain, however, that the district court was correct to characterize this as a jurisdictional issue. In support of its view, the district court relies on language from two Supreme Court cases indicating that courts' "jurisdiction to devise remedies" for FOIA violations depends on a showing that an agency has (1) improperly (2) withheld (3) agency records. U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 142 (1989); Kissinger v. Reporters Comm. for

Freedom of the Press, 445 U.S. 136, 150 (1980). As the Supreme Court more recently advised, however, it is unreasonable to read such language as making all the elements of a cause of action jurisdictional. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89-90 (1998).

But to decide this case, we need make no determination as to any jurisdictional question.[1] Treating the government's motion as one for summary judgment (as, in effect, the district court and the parties did), we find that Robert's claim is without merit.[2] Assuming arguendo that the district court did have jurisdiction, we therefore affirm the district court's judgment.

We have considered all of Robert's arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court.

For the Court,
ROSEANN B. MACKECHNIE,
Clerk of Court
by: _____

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[1]See *Fama v. Comm'r of Corr. Servs.*, 235 F.3d 804, 816 n.11 (2d Cir. 2000) (assuming jurisdiction arguendo and reaching a merits question where the jurisdictional issue was statutory, not constitutional, in nature, and the prevailing party would be the same whether or not jurisdiction was found).

[2]In Vital v. Interfaith Med. Ctr., 168 F.3d 615, 620-21 (2d Cir. 1999), we noted that a district court ordinarily has the duty to apprise pro se litigants of the consequences of failing to make an adequate response to a motion for summary judgment. Vital is not implicated where, as here, it is clear from the record that the litigant understands the

nature of the motion brought by the other party and the consequences of not adequately responding to it.

APPENDIX C

Second Circuit Summary Order, dated March 9, 2006, after oral argument, Instructing the Parties to Specifically Address the Application of 50 U.S.C. §1806 (f) to the FOIA Withheld Documents

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 9th day of March, two thousand and six.

BEFORE: Honorable Guido Calabresi.
Honorable Chester J. Straub,
Honorable Richard C. Wesley,
Circuit Judges.

CHARLES ROBERT VII, also known as Snowflake 5391,
Plaintiff-Appellant,

v. Docket No.: 05-1773-cv

UNITED STATES DEPARTMENT OF JUSTICE
Defendant-Appellant.

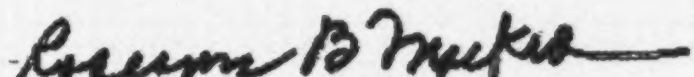
The Court hereby directs the parties to the above-captioned appeal to submit by April 3, 2006 supplemental letter briefs not to exceed 25 double-spaced pages, addressing the following two questions:

(1) Does 50 U.S.C. § 1806(f) apply to Robert's FOIA request to the Office of Intelligence Policy and Review FOIA

Coordinator for "all FISA [Foreign Intelligence Surveillance Act] Affidavits that were relied upon by the FISA court to authorize wiretaps of the telephones of Charles Robert, Esq. a/k/a Snowflake 5391 "?

(2) If ex parte, in camera review is required, what additional procedures, if any, are necessary to preserve the confidentiality of the information submitted to the District Court, including but not limited to the existence of an application or surveillance pursuant to FISA?

FOR THE COURT:



ROSEANN B. MacKECHNNIE
CLERK OF THE COURT

APPENDIX D

Eastern District of New York Judge Garaufis' Order, dated March 1, 2005, Dismissing the FOIA Action Seeking the Release of the FOIA Withheld Documents

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

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CHARLES ROBERT,

Plaintiff,

against

DEPARTMENT OF JUSTICE,

Defendant.

----------X

MEMORANDUM & ORDER

04-CV-1961 (NGG)(ETB)

GARAUFIS, District Judge.

The plaintiff Charles Robert brings this action pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Robert alleges that the Department of Justice ("DOJ") failed to release documents responsive to separate FOIA requests he made to two different DOJ components, the Office of Intelligence Policy and Review ("OIPR") and the Executive Office for the United States Attorneys ("EOUSA"). The defendant moves to dismiss Robert's complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. For the reasons set forth below, the defendant's motion is GRANTED and the complaint is dismissed.

I. PROCEDURAL HISTORY

On February 17, 2004, the plaintiff submitted a FOIA request to the OIPR which sought "the release of all FISA [Foreign Intelligence Surveillance Act] Affidavits that were relied upon by the FISA Court to authorize the wiretaps of

the telephones of Charles Robert, Esq., a/k/a Snowflake 5391 to the DOJ and the CIA." Declaration of James A. Baker ("Baker Decl."), Ex. A. On March 1, 2004, the OIPR informed Robert that under 5 U.S.C. § 552(b)(1) it could "neither confirm nor deny the existence of records responsive to [Robert's] request." Id. at Ex. B. The OIPR also informed Robert that even if there were records responsive to his request, "they would be exempt from disclosure under section (b)(1) of the Freedom of Information Act." Id. Robert filed an administrative appeal, which was received by the DOJ Office of Information and Policy ("OIP") on April 5, 2004. Declaration of Priscilla A. Jones ("Jones Decl.") ¶ 2. This appeal was closed as a result of Robert's FOIA action before this court. Id.

On March 31, 2004, the plaintiff submitted a FOIA request to the EOUSA for the "universe of 'EOUSA Christensen v. Harris County nonacquiescence policy' documents." Declaration of David Luczynski ("Luczynski Decl."), Ex. A. In his letter, the plaintiff described his request as constituting those "documents upon which the EOUSA Director and his staff determined that the policy of the DOJ was to defend the Social Security Administration (SSA) Commissioner and Health and Human Services (HHS) Secretary nonacquiescence policy whereby the 'law' applied to millions of legally defenseless aged, blind, and disabled citizens are not the duly promulgated regulations, but Executive Branch counsel's interpretations of the regulations." Id. (emphasis in original). On April 28, 2004, the EOUSA informed Robert that the information he requested was maintained by the OIP, not the EOUSA. Id. at Ex. C. Robert appealed the EOUSA's response to his FOIA request to the OIP on May 18, 2004. Jones Decl. ¶2. This appeal was closed as a result of Robert's FOIA action before this court. Id.

Roberts filed the instant action under the FOIA on May 12, 2004. On June 18, 2004, this court dismissed Robert's action *sua sponte* for the failure to comply with

Rule 8 of the Federal Rules of Civil Procedure but granted Robert leave to file an amended complaint. On July 15, 2004, Robert filed an amended complaint. The defendant subsequently filed a motion to dismiss the plaintiff's action for lack of jurisdiction. The defendant asserted that because the OIPR did not improperly withhold any document under FOIA, this court lacks subject matter jurisdiction over Robert's action under 5 U.S.C. § 552(a)(4)(B). With regard to Robert's request to the EOUSA, the defendant claimed that Robert failed to exhaust his administrative remedies and that in any event, the EOUSA did not maintain the records requested by Robert.

II. APPLICABLE LAW

A. Standard for Dismissal Under Rule 12(b)(1)

A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it. Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000) (citing Fed.R.Civ.P. 12(b)(1)). In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court may refer to evidence outside the pleadings. See Kamen v. American Tel. & Tel. Co., 791 F.2d 1006, 1011 (2d Cir. 1986). It is the plaintiff's burden to prove the existence of subject matter jurisdiction by a preponderance of the evidence. Makarova, 201 F.3d at 113 (citing Malik v. Meissner, 82 F.3d 560, 562 (2d Cir. 1996)).

B. Judicial Review of Responses to FOIA Requests

The FOIA entitles private citizens to access government records subject to nine exemptions that allow an agency to withhold requested information. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975); 5 U.S.C. § 552(b)(1)-(9). A district court may provide injunctive relief to order the production of agency documents improperly withheld after undertaking a *de novo* review of the agency

decision to withhold or redact information. 5 U.S.C. § 552(a)(4)(B). The statutory exemptions contained in the FOIA are to be "narrowly construed with doubts resolved in favor of disclosure." Federal Labor Relations Auth. v. United States Dep't of Veterans Affairs, 958 F.2d 503, 508 (2d Cir. 1992). Further, the agency bears the burden of supporting its decision to withhold or redact information requested under the FOIA. See 5 U.S.C. § 552(a)(4)(B); see also Massey v. FBI, 3 F.3d 620, 622 (2d Cir. 1993).

Pursuant to 5 U.S.C. § 552(a)(4)(B), district courts are vested with exclusive jurisdiction over FOIA cases. The Supreme Court has held that subject matter jurisdiction under § 552 is "dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.'" Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 159 (1980). "Unless each of these criteria are met, a district court lacks jurisdiction to devise remedies to force an agency to comply with the FOIA's disclosure requirements." United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 142 (1989). Whether an agency has "improperly" withheld records usually turns on whether one or more exemptions apply to the documents at issue. Tax Analysts, 492 U.S. at 152. Exemption 1 of the FOIA, asserted by the defendant in the instant action, exempts matters that are: "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1).

The FOIA specifically provides for an administrative appeal process following an agency's denial of a FOIA request. Under the FOIA, an agency must:

> (i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making

> such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and
> (ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal.

5 U.S.C. § 552(a)(6)(A)(i), (ii) (2002). The purpose of this appeal is to "provide agencies an opportunity to correct internal mistakes, and thus avoid unnecessary judicial review." Hogan v. Huff, No. 00-CV-6753, 2002 WL 1359722, at *4 (S.D.N.Y. June 21, 2002). If the denial of the request is upheld on appeal, the agency must "notify the person making such request of the provisions for judicial review of that determination." Id. § 552(a)(6)(A)(ii). Under the FOIA, a court lacks subject matter jurisdiction over a requester's claim where the requester has failed to exhaust the administrative remedies provided under the FOIA statute. See McMillan v. Togus Regional Office, Dep't of Veteran Affairs, No. 03-CV-1074, 2003 WL 23185665, at *1 (E.D.N.Y. Nov. 18, 2003) (Weinstein, J.); Hogan, 2002 WL 1359722, at *4 ("If a plaintiff fails to exhaust all available administrative remedies under FOIA and the Privacy Act before commencing an action in a federal court, the court lacks jurisdiction.").

III. DISCUSSION

A. Robert's Request to the OIPR

In answering Robert's request for "all FISA Affidavits that were relied upon by the FISA Court to authorize wiretaps of the telephones of Charles Robert," the OIPR informed Robert that the requested information was classified and that it could neither confirm nor deny the existence of records responsive to Robert's request. Baker

Decl., Exs. A, B. The defendant argues that it was entitled to provide this response to Robert because it determined that the subject matter of the request was classified on national security grounds and that the admission or denial that such material even existed would potentially compromise U.S. intelligence efforts. Because the response was proper under the FOIA, the court does not have jurisdiction over Robert's claims relating to the OIPR request. See Kissinger, 445 U.S. at 159.

The Foreign Intelligence Surveillance Act ("FISA") creates a Foreign Intelligence Surveillance Court ("FISA Court") which reviews government applications to conduct surveillance in aid of protecting the United States against attack by foreign governments or international terrorist groups. 50 U.S.C. §§ 1801(e), 1803. FISA requires that records relating to proceedings before the FISA Court, including applications made to that court, "shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of the Central Intelligence Agency." 50 U.S.C. § 1803(c).

Executive Order 12958, § 3.6 allows an agency to refuse to confirm or deny the existence or nonexistence of a requested record "whenever the existence or nonexistence is itself classified." Exec. Order No. 12958, § 3.6, *as amended* by Exec. Order No. 13292 (Mar. 25, 2003); Baker Decl. ¶ 8. Information which can be considered for classification includes "intelligence activities (including special activities), intelligence sources or methods, or cryptology." Id. § 1.4(c). The authority to make a determination whether particular material is classified may be delegated to United States Government officials by agency heads. Id. § 1.3. In his declaration, James Baker states that, in his capacity as the counsel for the Office of Intelligence Policy, he holds "original classification authority at the TOP SECRET level, by delegation of the Attorney General, and therefore [is] authorized to make determinations regarding classification

of national security information and to conduct classification reviews." Baker Decl. ¶ 4.

Robert seeks documents through the FOIA process that would indicate whether he has been the subject of a wiretap authorized by the FISA Court. See Baker Decl., Ex. A. As Baker indicated in his response to Robert's request, "[t]o confirm or deny the existence of such material in each case would tend to reveal which persons of organizations are the subject of such request." Id., Ex. B. As explained by Baker:

> If it were the policy of OIPR to indicate routinely that it maintains responsive information in its FISA files, these responses would provide trained intelligence analysts with individual pieces of information that could be compiled into a catalog of FISA activities, overseas electronic surveillance and physical searches. Such a policy would reveal instances where such activities have been used to obtain intelligence information, and also confirm instances where there have been no such activities. From such disclosures, hostile intelligence services could discover which intelligence agents operating in this county were known to the U.S. Government and which were not. This information could be used by a hostile intelligence service to deploy counterintelligence assets against the U.S. Government more effectively, increasing the risk that U.S. intelligence collecting would be neutralized or impaired.

Baker Decl. ¶ 11.

The defendant has met its burden to support its response to Robert's FOIA request. Pursuant to Exemption 1 of the FOIA, the scope of Robert's request is "specifically authorized under criteria established by an Executive order

to be kept secret in the interest of national defense or foreign policy" and is "in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). As classified information, Executive Order 12958 allows the OIPR to refuse to confirm or deny the existence or nonexistence of the requested records. See also Minier v. CIA, 88 F.3d 796, 800 (9th Cir. 1996) (a government may refuse to confirm or deny the existence of certain records if the FOIA exemption would preclude the acknowledgment of requested documents). Cases cited by Robert have no bearing on the instant action.[4] Accordingly, Robert's claim with respect to OIPR's response to his request is dismissed.

[4] For example, American Civil Liberties Union v. Department of Defense, 339 F.Supp.2d 501 (S.D.N.Y. 2004) involved a FOIA request for information related to the treatment and death of detainees since September 11, 2001 where the defendant blatantly disregarded the requirements of the FOIA by essentially failing to respond to the request, either by producing documents or claiming an exemption, close to one year after the request was first made. Here, the OIPR timely responded to Robert's request and explained the basis for its response.

B. Robert's Request to the EOUSA

Robert's request to the EOUSA encompassed "Christensen nonacquiescence documents." Luczynski Decl., Ex. A. The defendant asserts that this court does not have jurisdiction to review Robert's FOIA request to the EOUSA because Robert failed to exhaust his administrative remedies.

Robert's FOIA request to the EOUSA was dated March 31, 2004 and was received by the EOUSA on Monday, April 5, 2004. Luczynski Decl., Ex. A. The EOUSA responded to Robert's request on April 28, 2004, within less than 20 business days. Id. Ex. C. In its response, the EOUSA informed Robert that the EOUSA did not maintain the information requested by Robert and that Robert should direct his request to the OIP. Id. Rather than first appeal this determination, or direct a FOIA request to the OIP, Robert filed a FOIA action with this court on May 12, 2004. Robert subsequently filed an administrative appeal from the determination of the EOUSA dated May 18, 2004. Jones Decl. ¶ 2.

A FOIA requester can seek judicial review only after he has unsuccessfully appealed to the head of the agency as to any denial and thereby exhausted his administrative remedies. Sloman v. United States Dep't of Justice, 832 F.Supp. 63, 65 (S.D.N.Y. 1993). By failing to file an appeal with the OIP prior to initiating his FOIA action in federal court, Robert failed to exhaust his administrative remedies.[2] Accordingly, this court does not have jurisdiction over Robert's FOIA action. See id.

IV. CONCLUSION

For the reasons set forth above, the defendant's motion to dismiss is GRANTED with respect all of Robert's claims. The Clerk of the Court is instructed to close this case.

SO ORDERED.

Dated: March 1, 2005
Brooklyn, New York

/s/ Nicholas G. Garaufis
NICHOLAS G. GARAUFIS
United States District Judge

[2] In response to the defendant's claim that Robert failed to exhaust his administrative remedies, Robert appears to argue that he exhausted his remedies because more than twenty days elapsed before he received a response to his FOIA request. However, the submissions before this court indicate that EOUSA properly responded to Robert's FOIA request within 20 working days of receipt of the request.

APPENDIX E

Constitutional and Statutory Provisions

1. Article I of the Constitution as to the authority of the Congress:

Section 1. All legislative Powers here granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

2. Article II of the Constitution as to the authority of the President:

Section 3. ... he shall Take Care that the Laws be faithfully executed, ...

3. Article III of the Constitution as to the authority of federal Judges:

Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

4. The Foreign Intelligence Surveillance Act, 50 U.S.C. 1806 (f), *In camera* and *ex parte* review by district court:

> Whenever a court or other authority is notified pursuant to subsection (c) or (d) of this section, or whenever a motion is made pursuant to subsection (e) of this section, or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic

surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter, the United States District Court or, where the motion is made before another authority, the United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review *in camera* and *ex parte* the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance. Emphasis Added.

5. The Freedom of Information Act, 5 U.S.C. 552 (b)(1), exemption:

(b) This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and

(B) are in fact properly classified pursuant to such Executive order; Emphasis Added.

6. The Freedom of Information Act, 5 U.S.C. 552 c (3), exclusion provides:

> (3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section. Emphasis Added.

7. The President's March 25, 2003 Executive Order 13292 Section 1.5, duration of classification:

> Sec. 1.5. Duration of Classification. (a) At the time of original classification, the original classification authority shall attempt to establish a specific date or event for declassification based upon the duration of the national security sensitivity of the information. Upon reaching the date or event, the information shall be automatically declassified. The date or event shall not exceed the time frame established in paragraph (b) of this section.
>
> (b) If the original classification authority cannot determine an earlier specific date or event for declassification, information shall be marked for declassification 10 years from the date of the

original decision, unless the original classification authority otherwise determines that the sensitivity of the information requires that it shall be marked for declassification for up to 25 years from the date of the original decision. All information classified under this section shall be subject to section 3.3 of this order if it is contained in records of permanent historical value under title 44, United States Code.

(c) An original classification authority may extend the duration of classification, change the level of classification, or reclassify specific information only when the standards and procedures for classifying information under this order are followed.

(d) Information marked for an indefinite duration of classification under predecessor orders, for example, marked as "Originating Agency's Determination Required," or information classified under predecessor orders that contains no declassification instructions shall be declassified in accordance with part 3 of this order. Emphasis Added.

8. The President's March 25, 2003 Executive Order 13292 Section 1.7, classification limitations:

Sec. 1.7. Classification Prohibitions and Limitations. (a) In no case shall information be classified in order to:

(1) conceal violations of law, inefficiency, or administrative error;

(2) prevent embarrassment to a person, organization, or agency;

(3) restrain competition; or

(4) prevent or delay the release of information that does not require protection in the interest of the national security. Emphasis Added.

9. The President's March 25, 2003 Executive Order 13292, Section 3.6, authority to confirm or deny existence of documents:

Sec. 3.6. Processing Requests and Reviews. In response to a request for information under the Freedom of Information Act, the Privacy Act of 1974, or the mandatory review provisions of this order, or pursuant to the automatic declassification or systematic review provisions of this order:

(a) An agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors.

(b) When an agency receives any request for documents in its custody that contain information that was originally classified by another agency, or comes across such documents in the process of the automatic declassification or systematic review provisions of this order, it shall refer copies of any request and the pertinent documents to the originating agency for processing, and may, after consultation with the originating agency, inform

any requester of the referral unless such association is itself classified under this order or its predecessors. In cases in which the originating agency determines in writing that a response under paragraph (a) of this section is required, the referring agency shall respond to the requester in accordance with that paragraph. Emphasis Added.

10. The President's December 14, 2005 Executive Order 13392 - Improving Agency Disclosure of Information. 70 F.R.75373 (December 19, 2005):

Section 1 Policy:

> The effective functioning of our constitutional democracy depends upon the participation in public life of a citizenry that is well informed. For nearly four decades, the Freedom of Information Act (FOIA) has provided an important means through which the public can obtain information regarding the activities of Federal agencies. Under the FOIA, the public can obtain records from any Federal agency, subject to the exemptions enacted by the Congress to protect information that must be held in confidence for the Government to function effectively or for other purpose. Emphasis Added.